



Review of the Network Rail licence

April 2009

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Summary

The obligations in Network Rail's network licence form a vital part of the framework for the company's accountability. As the industry safety and economic regulator, we must ensure that the obligations and the way they stimulate the company to behave complement the other aspects of the framework – contracts, general legal obligations, outputs specified in periodic reviews, incentives, the financial framework, our enforcement policies and the company's corporate governance.

We consulted the industry between June and September 2008 and again in December 2008 on a number of changes we proposed to make to the network licence to strengthen Network Rail's obligations where appropriate and to ensure that the licence is suitable for the company going forward.

We proposed to:

- retain the current network stewardship obligation at the heart of the licence and where appropriate to extend this purposive approach to other parts of the licence;
- strengthen the obligation to emphasise Network Rail's planning, capacity allocation and asset management roles and to clarify Network Rail's role in running an efficient and effective industry timetabling process;
- strengthen the current "dependent persons" condition to give Network Rail a more purposive obligation to treat a wider range of stakeholders appropriately;
- increase the transparency of Network Rail's management incentive arrangements;
- make some changes to ensure the financial conditions are suitable for the company going forward (but not to introduce a restriction on use of the financial indemnity at this stage as conditions are not favourable at the moment), and provide adequate protections against importing undue risk into the core regulated business; and to
- make the licence clearer and more coherent.

In developing these proposals, we have considered the need to set out in sufficient breadth, clearly and purposively, Network Rail's obligations, to allow Network Rail

the flexibility to manage its business efficiently, to enable its customers to hold it to account, and for us to intervene where we believe our action is needed and will be most effective.

We considered the responses to the June and September 2008 consultations and made further changes to the proposals in the December 2008 consultation.

This document sets out our comments on the responses to the December 2008 consultation. As a result of these comments, we have made a number of changes to the detailed drafting of the proposals to modify the financial conditions, although we have not made any significant changes to the policies behind them. We will defer introducing a condition to restrict Network Rail's use of the financial indemnity, provided by Government but we continue to support Network Rail's commitment to raising unsupported debt when conditions are more favourable.

The notice making the modifications of the Network Rail network licence is in Annex 1. The modifications will take effect on 1 April 2009.

1. Introduction

Background

- 1.1 Network Rail is authorised to operate the main national rail network by a network licence. The Secretary of State for Transport originally granted the licence in 1994. We can change a licence under the Railways Act 1993 by agreement with the licence holder or by making a reference to the Competition Commission.
- 1.2 Network Rail is a monopoly on which its train operator customers and much of the wider industry depends. So the network licence, enforced by us, is an important regulatory tool to stimulate the company to operate efficiently, and to meet the needs of its stakeholders.
- 1.3 We consulted the industry in 2008 on a package of changes we proposed to make to the network licence. The changes were developed alongside PR08 to ensure that Network Rail's accountability is fit for purpose for the next control period.
- 1.4 Network Rail has a second licence authorising its operation of 18 stations. We did not propose to change the station licence, which is in a standard form for all operators of stations. So, when in this document we say "licence", we mean "Network Rail's network licence".¹
- 1.5 We took soundings on our thinking at key stages in our review of the licence. In particular, we held an industry workshop in September 2007 on both the licence review and the form and structure of Network Rail's outputs for PR08. As we developed our proposals, we had a number of informal discussions with key parties, including Network Rail.
- 1.6 We consulted the industry on the proposed changes in June² and July³ 2008. We had a good response to the consultation and, where consultees wished to,

¹ But note that some conditions in the network licence do apply to Network Rail's interests in stations. For example, previous condition 7 (now condition 1: network management in the modified licence).

² Review of Network Rail's licence: consultation. June 2008. This can be found at <http://www.rail-reg.gov.uk/upload/pdf/366.pdf>

we held subsequent meetings to discuss their concerns in more detail.⁴ We consulted again in December 2008 and that document (the December consultation)⁵ set out the reasons for the proposed modifications and their effect, as required by section 12 of the Railways Act 1993 (“the Act”).

- 1.7 We received 10 responses to the December consultation. We have considered all the responses and have made several changes to the detailed drafting of the proposed modifications to the financial conditions, although no significant changes to the policies behind them. We have also deferred introducing a condition to restrict Network Rail’s use of the financial indemnity, provided by Government, as conditions are not favourable at the moment. But we continue to support Network Rail’s commitment to raising unsupported debt when conditions are more favourable⁶. We have not made any other changes to our December consultation proposals.
- 1.8 Network Rail has consented to make the modifications to its licence, including the changes proposed following the December consultation. A copy of the revised licence can be found on our website⁷.

Structure of this document

- 1.9 Chapter 2 outlines the representations we received to the December consultation and our response to them.
- 1.10 The annexes contain the notice of modification and two letters. The first letter sets out the further changes made to the financial conditions following the

³ *Periodic Review 2008: licence review – consultation on financial conditions*, Office of Rail Regulation, July 2008. This can be found at http://www.rail-reg.gov.uk/upload/pdf/pr08-cons_netlic_170708.pdf.

⁴ Consultation responses are on our website at <http://www.rail-reg.gov.uk/server/show/ConWebDoc.9311>

⁵ Review of the Network Rail licence: statutory notice of proposed modifications. Dec 2008. This can be found at http://www.rail-reg.gov.uk/upload/pdf/cons-NR_netwrk_lic.pdf

⁶ These changes can be found at http://www.rail-reg.gov.uk/upload/pdf/netwrk_licence-010409-trackchanges.pdf

⁷ Network Rail’s Network Licence incorporating changes from 1 April 2009: http://www.rail-reg.gov.uk/upload/pdf/netwrk_licence.pdf

December consultation, with our reasons for those changes and their effect.
The second clarifies some points of interpretation of the new conditions.

2. Responses to the December consultation

- 2.1 We received 10 responses to the December consultation. On the whole, the representations were supportive of the proposed modifications.

Network Rail

- 2.2 Network Rail in its representations to us said that conditions were not favourable to begin issuing corporate debt without the Financial Indemnity Mechanism (FIM).⁸
- 2.3 Network Rail also raised a number of points about the detailed drafting of the proposals to change the financial conditions. We have worked with Network Rail to resolve these points and have agreed revised drafting. Our detailed response to the issues Network Rail raised and the reasons for the changes to the financial conditions and their effect are set out in a letter to Network Rail, attached in Annex 2.
- 2.4 Network Rail also asked for clarification on several points of interpretation on the non-financial conditions that had been discussed during the development of those conditions. We have written to Network Rail on these points but have made no further drafting changes. This letter is attached in Annex 3.

Further workstreams

- 2.5 We will continue to discuss with Network Rail further issues in relation to the network licence. The areas we have identified for further work are:
- (a) financial indebtedness limits and definitions of net debt and RAB;
 - (b) Network Rail's governance obligations (to follow the review by Network Rail's members); and
 - (c) a further detailed review of the financial ring-fence including a review of the current definitions of the different types of business in the network

⁸ Its representations included an analysis of financeability as discussed in the December consultation.

licence and the appropriateness of the boundaries between permitted and de-minimis activities.

Other representations

- 2.6 PassengerFocus, First Group, Rail Freight Group and Transport for London (TfL) were content with the proposed changes. TfL sought confirmation that the implementation of the revised licence (including ORR oversight) will provide effective support to the delivery of major enhancement projects such as Thameslink and Crossrail. We consider that TfL's interests are covered in the licence by its status as a funder and by the specific obligations relating to it in the new condition 8 (stakeholder relationships). In addition, Thameslink is specified as required output in the periodic review determination, so is therefore considered to be a reasonable requirement under condition 1 (network management).
- 2.7 The Department for Transport (DfT), Transport Scotland (TS), DB Schenker (DBS) and Mr Tom Winsor of White & Case (TW) made representations about our proposals to remove the original licence condition 24 dealing with the asset register and replace it with an obligation in the new condition 1 (network management). DfT and TS and TW felt that it would not be appropriate to remove the more explicit obligations regarding the asset register. TS and DBS were concerned that it is not explicit that the asset information should be accessible to customers and funders.
- 2.8 We consider that it is appropriate to move to a more purposive obligation that requires Network Rail to maintain relevant asset information during the next control period. Under the original asset register condition Network Rail was required to establish and maintain an asset register. In April 2008, we accepted that Network Rail had complied with the requirements of its licence in relation to the establishment of the asset register.
- 2.9 We did, however, have residual concerns about how the new processes are being embedded throughout Network Rail and becoming a natural part of its operational culture. These concerns included questions about aspects of data quality, and the quality and timely availability of asset information to external stakeholders. It remains important that Network Rail continues to implement its strategy on its asset information properly and to use it

throughout the organisation, both to inform its asset policies and to comply with its core stewardship obligations.

- 2.10 For this reason we have kept, directly under the purpose and general duty in the new condition 1 (network management), the obligation to maintain appropriate, accurate and readily accessible information about the relevant assets. We consider that a more purposive obligation gives Network Rail sufficient flexibility to decide how best to run its business and gives us more flexibility to intervene where appropriate. We will continue to monitor Network Rail's compliance with this obligation and to ensure that there is adequate visibility of this process.
- 2.11 We consider that the requirement to maintain readily accessible information on relevant assets is wider than the previous obligation in the original asset register condition. In addition, information requirements could be addressed through the new condition 8 (stakeholder relationships). We have made it clear to Network Rail that we consider it important that accurate information is made available to its customers and funders, as appropriate.
- 2.12 DfT also said that while it supports the approach to the FIM restriction, it would like confirmation that this requires Network Rail to justify its conclusions on whether it has met its financeability test. It also noted that the proposed amendments to the cross-default and *pari passu* provisions will need to be revisited when the outcome of the assessment is known. DfT supported the cumulative limit and turnover limit for *de minimis* business, but recommended that these tests are in addition to an annual investment limit of £100m.
- 2.13 We confirm that Network Rail has had to justify its conclusions on whether it has met the financeability test, and we note DfT's comments on cross-default and *pari passu*. We do not consider it necessary to have an annual investment limit as well as a cumulative investment limit as the important issue is the total amount of investment, not when the investment was made.
- 2.14 TS welcomed the approach to conduct both financeability and value for money tests before a decision is taken to restrict the FIM and thereby enable Network Rail to seek unsupported debt. However, TS was concerned that the wording of our document meant that we would exclude them from discussing the issue. It considered that it should be consulted, as Scottish Ministers are

subject to the same efficiency assumptions, financial framework and rate of return as the DfT.

- 2.15 We welcome TS's support for our approach in conducting both the value for money and financeability tests before deciding whether the FIM should be restricted. We confirm we will continue to consult TS before restricting the FIM.
- 2.16 DBS was disappointed that ORR has decided not to explicitly recognise in the proposed licence that freight operators and their customers need accurate and timely timetable information. It believed that the obligation in the new condition 1.23 (timetable planning) was not clear enough, as it could be argued that Network Rail could meet its obligation to run an efficient and effective timetabling process without necessarily providing freight operators with timely and accurate information.
- 2.17 We consider that that obligation does require Network Rail to give accurate and timely information to all its customers, as is necessary to enable them to plan their businesses with a reasonable degree of assurance and to meet their obligations to railway users. We have made this clear to Network Rail in our letter on points of interpretation in Annex 3.
- 2.18 DBS also believed that Network Rail's obligation to plan the renewal, maintenance and enhancement of its network in a timely and efficient manner (previously in licence condition 9.2(a)) should be kept as an addition to the purposive obligation in the new condition 1.23. We believe that the substance of this obligation has been retained, in that condition 1.23 is now directly tied to the purpose and general duty in conditions 1.1 and 1.2, which expressly refer to these points.
- 2.19 TW also suggested that the scope of the licence in condition 1 (network management) and 8 (stakeholder relationships) should be widened to include companies trying to improve the railway and land and other properties which form part of the railway estate or are immediately adjacent to it. He suggested that the difficulties which Network Rail's neighbours and potential investors in railway and associated assets experience in trying to reach fair and affordable terms with Network Rail in connection with developments on, over or adjacent to its network are a substantial deterrent to doing business on and near the railway.

- 2.20 We have widened the scope of the licence in both these conditions to include potential customers and funders as stakeholders in more of the obligations. We have also replaced the obligation to have a dependent persons' code of practice with a broader obligation to publish the principles and procedures by which Network Rail will deal with all its stakeholders. In developing the obligations we considered carefully what the scope of the licence should be and reached the view that it is appropriate to focus on current and potential providers and funders of railway services and facilities.
- 2.21 TW also commented that there was no requirement for ORR to consult third parties on notices or guidelines issued under the licence. We do not consider that it is necessary to impose such obligations on ORR in Network Rail's licence. However, we do, as a matter of course, consult other parties as appropriate.
- 2.22 National Express was broadly content with the proposed licence but was concerned that there was no explicit obligation to deliver the delivery plan. It was also concerned that Network Rail could use the new condition 1.12 (delivery plan) to delay any requirement from ORR to improve the plan by 5 months.
- 2.23 We consider that it is right not to include an explicit obligation to deliver the plan itself. Network Rail's obligation is to deliver the customer and funder reasonable requirements in condition 1.1, which include the regulated outputs set out in the periodic review determination and firm commitments in the delivery plan. The delivery plan demonstrates how it proposes to comply with this obligation, but it also contains aspirational targets that are not regulatory targets. If we thought that Network Rail was failing or likely to fail to deliver any reasonable requirements then we would take appropriate action.
- 2.24 The 5 month notice period in condition 1.12(a) only refers to the original delivery plan notice that we issue at the start of the process. If we require Network Rail to make alterations to the delivery plan to meet our requirements, we will specify a reasonable timescale in which those changes should be made.

Annex 1: Notice of modification

Michael Lee
Director of Access, Planning & Performance
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21 March 2009

Ms Hazel Walker
Group Company Secretary
Network Rail Infrastructure Limited
Kings Place,
90 York Way
London N1 9AG

Dear Hazel

Notice of modification of Network Rail Infrastructure Limited's network licence

Network Rail Infrastructure Limited ("Network Rail") has been granted a network licence ("the licence") under section 8 of the Railways Act 1993 ("the Act") subject to conditions contained in the licence.

In accordance with section 12(2) of the Act, on 19 December 2008, ORR gave notice of its proposal to modify the licence to:

- (a) retain the current network stewardship obligation at the heart of the licence and where appropriate to extend this purposive approach to other parts of the licence;
- (b) strengthen the obligation to emphasise Network Rail's planning, capacity allocation and asset management roles and to clarify Network Rail's role in running an efficient and effective industry timetabling process;
- (c) strengthen the current "dependent persons" condition to give Network Rail a more purposive obligation to treat a wider range of stakeholders appropriately;
- (d) increase the transparency of Network Rail's management incentive arrangements;
- (e) make some changes to ensure the financial conditions are suitable for the company going forward (but not to introduce a restriction on use of the financial indemnity at this stage), and provide adequate protections against importing undue risk into the core regulated business; and to
- (f) make the licence clearer and more coherent.

The notice published by ORR set out the reasons for the modifications and their effect. It required any representations or objections to the modifications to be made to it on or before 5 February 2009.



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ORR has considered the representations or objections which were duly made and not withdrawn and has held further discussions with Network Rail on those representations or objections. These discussions have led to a number of drafting alterations but no material changes to policy. The reasons for these alterations and their effect are set out in a letter of 26 March 2009 to Network Rail.

The licence holder has given its consent to the modifications, including those discussed following the consultation that are set out in the letter of 26 March 2009.

Modifications

Under section 12(1) of the Act and with the consent of the licence holder, I therefore modify the licence by deleting Parts II and III of the licence in their entirety and replacing them with the new Parts II and III set out in Schedule 1 of this notice. There will also be consequential changes to the index page of the licence. This modification will take effect on 1 April 2009.

Yours sincerely

A handwritten signature in black ink that reads 'Michael Lee'. Below the signature is a horizontal line.

Michael Lee

Schedule 1 – modifications

The modification replaces parts II and III of the licence in their entirety with the new parts II and III of the modified licence, which can be found on our website at:

http://www.rail-reg.gov.uk/upload/pdf/netwrk_licence.pdf

Annex 2: Letter on further changes to the financial conditions

John Thomas
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26 March 2009

Paul Plummer
Director, Planning & Regulation
Network Rail Infrastructure Limited
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90 York Way
London
N1 9AG

Dear Paul

Network Rail's response to our statutory notice on Network Rail's network licence

1. Thank you for your response to our statutory consultation on proposed changes to your network licence. I set out below how we are intending to deal with your comments.
2. The revised draft of the proposed network licence, containing the changes we are proposing to make to address some of your comments in relation to conditions 3, 4 and 11, is included in the annex to this letter. We do not consider these changes to be material and therefore do not consider it necessary to undertake another round of statutory consultation.

Financial indemnity mechanism (FIM) restriction (Paragraph 5.1 of Network Rail's response)

3. Although we did not propose in December 2008 to introduce a licence modification to restrict Network Rail's use of the FIM, we said that we would assess whether to do so after we had received your representations on this issue on 5 February 2009. We have considered your representations and agree with you that conditions are not favourable for you to begin issuing corporate debt without the FIM. We will therefore not be proposing to restrict the FIM at this time but we continue to support your commitment to raising unsupported debt when conditions are more favourable. We will discuss with you the most appropriate arrangements for continuing a dialogue with the ratings agencies.

Financial indebtedness condition (Paragraphs 5.2, 5.3, 5.4 and 5.17 of Network Rail's response)

4. We said in December 2008 that if we concluded it was not appropriate to restrict the FIM at this time, we would consult on whether the current financial indebtedness limits in the network licence remain appropriate. We will begin an initial round of consultation

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shortly. We will therefore, except as indicated below regarding the FIM fee, consider your suggested changes in relation to this condition as part of our upcoming review.

5. The appropriate definitions of net debt and RAB need to be considered alongside the appropriate financial indebtedness limit. Your comment about the RAB appears largely reasonable and in principle appropriate. We can also see why in principle it would be appropriate to include some specific bonds held by Network Rail for treasury management purposes in the definition of net debt. However, your suggested wording is not specific enough. We will address this point in our upcoming review.

6. We can confirm that we will not revise the FIM fee part of the condition as it reflects an important assumption in our determination.

Restriction of activities: holding shares or other investments (Paragraphs 5.5 and 5.6 of Network Rail's response)

7. In your response you have suggested that we should change the drafting of the restriction on Network Rail's holding of shares and other investments. We accept in principle that there is no objection to NRIL or its subsidiaries or NRIF or its subsidiaries holding shares or other investments in a company that funds permitted business where that company also carries on permitted business, provided that a company that funds permitted business is a subsidiary of NRIL. We also accept in principle that a company that carries on de-minimis or consented business should be able to raise finance in order to finance those specific activities. It was not our intention to exclude these two types of funding arrangements from the network licence and therefore we have changed the drafting of the licence to reflect these points.

De-minimis (Paragraphs 5.7, 5.8, 5.9 and 5.10 of Network Rail's response)

Consented business

8. Your response suggested that we should make it clearer how business that we have consented to is treated by the de-minimis condition. We are proposing to revise this condition largely in line with your suggested drafting in the interests of making the condition as clear as possible. However, we do not consider it changes the requirements of the condition.

Adjustments for inflation

9. Even though we were not proposing to make any changes to the current licence which adjusts the allowed levels of de-minimis activity for inflation (both positive and negative), your response nevertheless asked for the indexed turnover limit to be no longer adjusted for inflation in a symmetrical way. Adjusting de-minimis limits for inflation is simply

to ensure that there is no erosion in the limits in real terms over time. It is therefore logical for the adjustment to the limits to be symmetrical. Of course, if de-minimis business has turnover increasing at a much faster rate than inflation, there could come a point when the limits are breached. This could occur irrespective of whether inflation was positive or negative. In such circumstances, you could ask for consent to carry on with de-minimis activity. Therefore, we do not propose to make the change that you suggest.

De-designation

10. You raise concerns that the de-designation provision in the current licence (to which no changes were proposed by us), leaves you at risk of being in breach of your licence if we suddenly decide to de-designate activity that we had previously consented to. We can confirm that if we did decide to consider whether to de-designate any activities then we would consult and give you appropriate notice.

Starting point

11. You have said that you think it is appropriate for the revised de-minimis investment limit to start on 1 April 2009. You have since confirmed in an email dated 13 March 2009 that as far as you are aware Network Rail does not hold any shares or other similar investments in de-minimis business, that the expenditure on de-minimis is of an operating cost nature instead of a capital nature and will be offset to some extent by income; you have also provided information as regards current levels of de-minimis expenditure. In light of this, we agree with you that Network Rail's current level of net de-minimis investment is immaterial and given these points, we accept that it would be disproportionate to require you to calculate the value of the investments made before 1 April 2009 using the new method. We have therefore drafted the proposed network licence so that the revised investment limit starts on 1 April 2009.

Cross-default obligations (Paragraphs 5.11 and 5.15 of Network Rail's response)

12. As we have said in previous documents and meetings our intention with regard to cross-default obligations was to consent to you having cross-defaults where appropriate in relation to agreements or arrangements that benefit from the support of the FIM but that other cross-defaults will not be allowed. You have expressed a strong preference not to rely on consents but to allow cross-defaults in relation to agreements or arrangements that benefit from the support of the FIM on the face of the licence. Given that this would not change our policy intent, we are prepared to make this change.

Indebtedness (Paragraph 5.12 of Network Rail's response)

13. Your response suggested that we had not included de-minimis activity as an activity that NRIL or its subsidiaries or NRIF or its subsidiaries can have indebtedness in relation to. Following your identification of the practical problems with our drafting of this condition, we are proposing to amend this condition so that those companies can have indebtedness in relation to de-minimis business. This is now consistent with our general approach to de-minimis.

Regulatory accounts (Paragraph 5.16 of Network Rail's response)

14. We can confirm that we will not use the proposed paragraph 11.9 (e) to require you to publish (as opposed to provide to us) forward looking financial ratios. However, if we believe that publication would support us in performing our regulatory functions (for example in terms of enhancing incentives), we would discuss with you our proposals and apply the appropriate tests by reference to the Railways Act in deciding whether to publish.

Credit rating (Paragraphs 5.14 of Network Rail's response)

15. Given that we are not proposing to consult on the inclusion of a FIM restriction in the licence, which means NRIL will not be required to raise corporate debt at present, we have decided to leave the present network licence requirement unchanged. We can confirm that under the current licence wording, NRIL will not be required to maintain a credit rating until NRIL raises corporate debt.

Other changes

16. As we have discussed we have also made some other minor drafting changes and we have revised the reference to the state financial indemnity in the level of financial indebtedness condition.

Further review of the financial ring-fence

17. As we have discussed with you previously we will be conducting a further detailed review of the financial ring-fence in the future. This review is in addition to the consultation on financial indebtedness limits and definitions of net debt and RAB mentioned above and will include, but will not be limited to, a review of the current definitions of the different types of business in the network licence and the appropriateness of the boundaries between permitted and de-minimis activities.

18. We envisage this review being initiated in the second quarter of 2009-10 and will discuss with you the details of this proposed work stream and how we intend to carry out the review in due course.

Yours sincerely

A handwritten signature in black ink that reads "John Thomas". The signature is written in a cursive style with a long horizontal stroke at the beginning.

John Thomas

Annex to letter of 26 March

A copy of the modified licence showing the changes made following the December consultation can be found on our website at:

http://www.rail-reg.gov.uk/upload/pdf/netwrk_licence-010409-trackchanges.pdf

Annex 3: Letter to Network Rail on points of interpretation

Rob Plaskitt
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26 March 2009

Mr Geoffrey Kitchener
Regulatory Legal & Compliance Manager
Network Rail Infrastructure Limited
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Dear Geoffrey,

Review of the network licence – non financial issues

In response to your representations on our recent consultation on the review of the network licence, and following our meeting with you on 6 February, I am writing to address the concerns you raised. John Thomas has written separately on the more substantive issues relating to the financial conditions.

Proposed licence conditions

The access capacity allocation obligation (LC1.18) is intended to emphasise the requirement to cooperate with those seeking new paths on the network. However, it uses a definition of network (used throughout LC1) which includes stations and depots in which Network Rail has any estate or interest or right. In many cases, however, Network Rail has pointed out that it is not the operator of those stations or depots, so cannot give access to those facilities. ORR confirms that the extended definition of network is not intended to give rise to any obligation in relation to capacity that Network Rail is unable to fulfil by virtue of not being the operator of a network (including stations and depots) that it owns.

Obligations under LC1 which are expressed to require action in complying with the general duty in LC1.2 do not impose a duty beyond what is reasonably practicable. We said in paragraph 3.14 of the statutory consultation that "it is clear that achieving the purpose and general duty are the primary obligation; all the additional specific objectives refer to achieving the general duty which must be done (only) to the greatest extent reasonably practicable".

The obligation in LC1.17 requires Network Rail from time to time and when so directed by ORR to review and, if necessary, amend each RUS to ensure certain things. In this





instance, the "ensure" obligation applies to Network Rail's actions. ORR accepts that any outcome may involve other parties and that the "ensure" obligation does not require Network Rail to attempt to control how those other parties behave.

The asset management obligation in LC1.20 refers to maintaining appropriate information about the relevant assets, including their condition, capability and capacity. This has given rise to a query from Network Rail in relation to those assets where it does not maintain certain information because it is not feasible to do so. In this case, the requirement for "appropriate" information means that it is not necessary to maintain information about the condition, capability and/or capacity of a relevant asset where it would be inappropriate to do so.

We make it clear in paragraph 3.56 of the statutory consultation that we consider that the general duty as regards timetable information for passengers in LC2 extends to the provision of up-to-date information to passengers on days of disruption.

We make it clear in paragraph 3.59 of the statutory consultation that we consider the timetable planning obligation in LC1, coupled with the stakeholder obligations in LC8, oblige Network Rail to give its freight customers timely and accurate information on train movements to enable them to plan their businesses with a reasonable degree of assurance and to meet their obligations to railway users.

The obligation in LC16.9 requires Network Rail to publish a statement summarising how the criteria have been applied in determining remuneration levels. We have said in discussions with Jim Cornell and Paul Plummer that this does not require Network Rail to publish detailed deliberations but the summary needs to show enough information for a dispassionate observer to see how Network Rail's performance across the piece has been taken into account in deciding on bonuses.

Best practice

Network Rail raised some questions about ORR's interpretation of best practice as used in LC1.1 and related matters in light of the move to a more purposive licence. It stated that it should be recognised that there may be several ways to achieve compliance, all in keeping with best practice, and that it should not be considered to be an absolute standard independent of circumstances, but must reflect the starting point, rate of progress and prioritisation in the face of competing requirements. Network Rail has commented that it would be appropriate for ORR's enforcement policy or penalties statement to be amended to recognise these comments.

ORR confirms that LC1.1 is clear that the obligation is to achieve the purpose in accordance with best practice to the greatest extent reasonably practicable having regard to all the relevant circumstances. In addition, we have said in discussions that we do not



consider best practice to be a single gold-plated standard but something that will be context sensitive.

ORR does not consider that these comments should be dealt with as part of the narrowly focused penalties statement review. Moreover, the points raised may require wider debate within the industry. We therefore propose to consider these comments further when we next come to review our enforcement policy.

Consents

We confirm that any existing consents will continue to be valid, notwithstanding the proposed modifications to the network licence. If there is any ambiguity about the language used in any consent, it will be appropriate to refer to the version of the network licence which was in force at the time that consent was granted.

Further workstreams

We will continue to discuss with Network Rail further changes to the network licence. The areas we have identified for further work are:

- (a) financial indebtedness limits and definitions of net debt and RAB; and
- (b) Network Rail's governance obligations (to follow the review by Network Rail's members); and
- (c) a further detailed review of the financial ring-fence including a review of the current definitions of the different types of business in the network licence and the appropriateness of the boundaries between permitted and de-minimis activities.

We will progress these workstreams as soon as is practicable during 2009/10.

In addition, we have agreed that it would be helpful to hold a workshop to discuss our approach to monitoring and other related issues in CP4. Arrangements for this are underway.

Yours sincerely

A handwritten signature in black ink, which appears to read 'Robert M Plaskitt', is positioned below the 'Yours sincerely' text.

Rob Plaskitt